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PARTICULAR APPLICATIONS OF THE RIGHTS OF DEFENCE IN RELATION TO ANTICOMPETITIVE PRACTICES

Or some remarks on effective respect for fundamental rights*

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"There are fundamental values without which even the most elaborate law would be reduced to a soulless and ephemeral set of rules". This view might serve to set the tone for a discussion of the rights of the defence and competition law.

Taking freedom of trade and industry as its basic principle, the Ordinance of 1 December 1986 made profound changes in the institutional mechanisms of competition in France.

Respect for freedoms were the innovative aspect in the establishment of the new economic order, and substantial safeguards were therefore incorporated into the procedures designed to ensure the free functioning of the market. The previous arrangements, sharply criticized on account of the exceptional powers they conferred on the Administration and their inadequate provision for adversary proceedings before the Competition Commission, thus gave way to a mechanism that both cut down the constraints on economic operators and ensured effective competition, with the broad aim of respect for fundamental principles.

The most immediately obvious changes were the separation of investigative and decision-making powers and the removal of the prerogatives of investigation derogating from ordinary law. The introduction of a truly adversary procedure before the Council likewise revealed the importance and scope of the changes.

In the interest of the proper administration of justice, the new rules of the game were made more complete with the transfer of control over decisions of the Competition Council to the branch of justice that is the constitutional guarantor of freedoms: enforcement of the law on anticompetitive and restrictive practices is now overseen by the courts, under the general authority of the Court of Cassation.

Over a period of four years, moreover, the Supreme Court and the Paris Court of Appeal, in addition to providing a literal interpretation, sought to specify and supplement the procedural rules concerning the rights of defendants, in the light both of the general principles of our domestic legal system and the fundamental rights deriving from the international undertakings entered into by France.

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* Gazette du Palais, 22-23 April 1992.

These efforts to define a procedure affording basic safeguards were applied with equal rigour to the two main stages of the proceedings: the collection of evidence or investigation; and discussion of the evidence and complaints, i.e. the adversary phase in which all parties are heard.

This body of jurisprudence, taking into account the subtle alchemy between complex and changeable notions and the immutable principles of law, must certainly be welcomed as a very significant step forward in regard to the rights of the defence.

It is the very reflection of the views expressed by André Potocki, who held that "the law of competition must promote economic freedom but also, and above all, freedom as such".

I. Fundamental rights and the collection of evidence

With regard to competition - or, more exactly, anticompetitive practices - the evaluation and possible penalization of activities showing signs of a breach of established rules require preliminary, detailed and comprehensive investigation in all cases. The changing real situation to which the law on competition applies and the technical nature of the economic concepts employed in the definition of anticompetitive practices make it impossible to move immediately from the facts to the law; an accurate evaluation of the facts and a fair description of the practices call for an active phase of research and investigation. In other words, it is essential to make the case ready to be tried, in order to establish unequivocally whether an offence has been committed or whether the economic order has been affected.

The investigation is therefore essential, serving both as a guarantee of objectivity for those subject to the law on competition and as a means of ensuring the effective application and observance of that law. Nevertheless, effectiveness in the preparatory phase, however necessary, cannot be sought at any price. As in criminal matters, the methods of investigation must aim to ensure respect for the fundamental rights of the individual and the basic principles laid down in our legal tradition, many of which have been reaffirmed by the Constitutional Council and reflected in the international conventions on human rights.

While the law on anticompetitive practices does not relate to criminal law - other than in the specific case provided for in article 17 of the Ordinance of 1 December 1986 - it certainly comes within a broadly punitive sphere, given the nature of the sanctions that may be decided upon by the Competition Council.

This is how the Constitutional Council sees the powers of sanction vested in the various administrative authorities.

In several decisions, it has taken the view that article 8 of the Declaration of the Rights of Man and of the Citizen and the fundamental principles recognized by the laws of the Republic concern not only the penalties that may be imposed by the criminal courts but necessarily extend to

all sanctions of a punitive nature, even if the legislature has seen fit to assign the task of imposing such sanctions to a non-judicial or non-jurisdictional authority.

This was the spirit that guided the elaboration, in 1986, of the new rules concerning powers of investigation. Thus, for each type of investigation, safeguards against the potential risks of infringement of fundamental rights have been provided.

Nearly four years ago, the courts furthermore specified the conditions for the exercise of the investigative powers vested in the Administration, aiming to strike a fair balance between effective use of those powers and respect for human rights.

The two types of investigative powers vested in the authorities responsible for monitoring competition should now be considered in order to illustrate this dual requirement.

A. Enforceable investigatory powers

With regard to competition and restrictive practices, until 1986 investigation proceedings were governed by the provisions of Ordinance No. 1484 of 30 June 1945, which allowed investigators to use their own discretion in exercising their powers to make inspections and seizures: they could carry out a search at any time, without procedural guarantees or control in so far as the firm was concerned.

The legislation in this area was revised on the initiative and under the authority of the Constitutional Council.

By Decision No. 83-164 of 29 December 1983, the Council defined the legal framework with which domiciliary inspections could be made by Tax Administration officials. Referring, first of all, to article 13 of the Declaration of the Rights of Man and of the Citizen concerning the need for public taxation, it legitimized the principle of searches as part of efforts to prevent tax evasion. Secondly, it took the view that such investigations could be conducted only in conformity with article 66 of the Constitution, whereby the judicial authorities safeguard all aspects of the freedom of the individual and, in particular, inviolability of the domicile.

Confirming its previous jurisprudence, the Constitutional Council expressly invoked the constitutional principle of inviolability of the domicile. To reconcile the need to safeguard the freedom of the individual with the need for taxation, it required that searches should not only be authorized by the judge, but that the judge should furthermore verify specifically the justification for the search and supervise the way in which it is conducted.

In accordance with these principles, the legislature placed inspections and seizures by DGCCRF officials under the supervision of the courts.

Thus, article 48 of the Ordinance of 1 December 1986 provides that each inspection must be authorized by order of the presiding officer of the court

of major jurisdiction or of a deputy presiding officer who has jurisdiction over the premises to be inspected. However, the powers of the judge do not end with this authorization, since the inspection takes place under his responsibility. This meets the requirements laid down by the Constitutional Council in Decision No. 184 of 29 November 1984, calling for the judge to supervise each inspection effectively and deal with any incidents that may arise.

For this purpose, the judge appoints one or more judicial police officers to be present during the inspection and to inform him of the outcome (art. 48(3)). The judge may also visit the premises during the search (art. 48(4)) and can, if necessary, suspend or terminate the inspection.

The judge's involvement in all stages of the proceedings is without doubt a safeguard for the firm that is being checked. However, the protection enjoyed by virtue of the constitutional safeguard of inviolability of the domicile in practice depends on the nature of the jurisdictional supervision exercised.

"While the topic of the freedoms of the individual lends itself to declarations of principle, the reality of protecting them is very often a matter of detail".

Indeed, the supervision exercised by the judge must not be purely formal; he must play an "active role" in the inspection procedure so that his intervention constitutes a real safeguard for the firm concerned. This was the view taken by the Court of Cassation when it solemnly sanctioned, by five judgements of 15 December 1988, the orders issued by several presiding officers of courts of major jurisdiction.

The results to be noted first and foremost are those relating to the grounds for issuing execution orders. It is this aspect of jurisdictional supervision that has received the most attention. Regarding the initial phase of the inspection procedure, the Supreme Court is very clear in condemning the practice of using a standard clause stating that the information provided by the Administration is sufficient to justify the inspection: "Whereas to accede to the request of the Directorate on Competition for permission to carry out inspections and seizures on the premises of company X, the order in question confines itself to noting that the information provided gives reason to suppose that the said company has engaged in anticompetitive practices, by basing his decision on this ground alone, the court's presiding officer failed to enable the Court of Cassation to ascertain whether the justification for the request had been verified".

Clearly, the supervision by the presiding officer of the court of major jurisdiction has to be as stipulated by law. Article 48 (3) of the Ordinance of 1 December 1986 states that "the judge must verify that the request for authorization submitted to him is well founded ...". According to Professor Dugrip, this provision makes the presiding officer of the court of major jurisdiction "the judge of the need for the inspection: he has to determine whether the circumstances of the case justify infringement of the inviolability of the domicile ... . If the law does not require here, as it does in criminal cases, that information should be laid, the authorization

must rely on a sufficiently well-reasoned assumption that the inspection will make it possible to obtain specific evidence of the suspected offence." And the order issued by the judge must refer to the information on which it is based. The Court of Cassation is then in a position to ascertain whether the request has been justified. For this purpose, the judge cannot be content with vague and formal information but must have knowledge of the actual facts of the matter. This means that DGCCRF officials must submit a well-substantiated case to him.

Specific verification of the grounds for the decision, as a legal requirement for granting authorization, is a safeguard of respect for fundamental freedoms. Even if the Court of Cassation does not refer in its opinions to the decisions of the Constitutional Council concerning inviolability of the domicile, it was undoubtedly guided by those decisions here.

Another safeguard of the effectiveness of remedies before the Court of Cassation - disregard of which was sanctioned in the judgements of 15 December 1988 - is that the party concerned must be notified of the order permitting the inspection by service of a document or by a record indicating the remedy available and the time-limit for appeal. Mere presentation or delivery by registered letter of a copy is not sufficient to start the five-day period established for lodging an appeal.

Verification of the justification for the inspection, substantiation of the grounds for issuing an execution order and notification thereof are not the only issues on which the Court of Cassation has had to make a judgement.

Point by point, the Supreme Court, resolutely following the path indicated by the Constitutional Council, has specified the rules of jurisdictional supervision and the measures called for by article 48 of the Ordinance of 1 December 1986.

In this regard, the ground is now well signposted. Since a judgement of 20 November 1989, the Commercial Division of the Court of Cassation believes that orders issued under article 48 provide all the safeguards essential for the protection of fundamental rights.

However, it might well be asked whether the Supreme Court has not gone too far in allowing, in a recent judgement, that a firm whose domicile has not been violated can nevertheless appeal against an order authorizing a search.

To be sure, the safeguards relating to enforceable investigation - such as judicial authorization and the possibility of entering an appeal - have their basis in infringement of the principle of inviolability of the domicile. It is therefore hard to see the value of action being taken by a firm that has not been subject to any investigation.

Furthermore, this solution could undermine the procedures, because an uninspected company would be able at any time - even when other firms have been foreclosed - to lodge an appeal with the Court of Cassation.

B. Ordinary investigatory powers

The desire to ensure both effectiveness in the investigation of offences and respect for firms' rights - adapted to the specific characteristics of an "ordinary" investigation - likewise guided the elaboration of the powers defined principally in article 47 of the Ordinance of 1 December 1986.

While the protection afforded in connection with these non-compulsory methods of investigation is less extensive, because the safeguards are proportionate to the risk of infringement of fundamental rights, the "ordinary" procedure was also established with this dual necessity in mind.

The Ordinance and the related Decree define the limits of this type of investigation.

These limits may be appreciated by contrasting them with the much wider ones under article 48.

While the investigators may be given access to all premises, grounds or transport facilities, these can only be places intended for professional use and exclude premises serving in part as the domicile of the parties concerned.

The investigators are not authorized to seize documents under the terms of article 48 (1). They may only request them to be communicated.

Such a request cannot be of a general nature but must relate to documents which the investigator knows to exist and can identify.

Furthermore, only business documents may be taken, and solely in the form of copies.

Clearly, with the powers of investigation thus delimited, the risks of infringement of fundamental rights are extremely small.

Prior authorization from the court is not required for inspection purposes. However, the "article 47" procedure may result in imposition of the same sanctions as with an enforceable, or compulsory, investigation. Thus, even if the firm is not "charged" at this stage, it must be able to arrange for its defence.

It is the record of communication or statement, obligatory for any investigation, that will attest to the collection of documents or statements and enable the judge to verify that the proceedings have been conducted in accordance with the legal requirements.

The conditions for drawing up this record of the proceedings are strictly defined. They are set out in article 46 of the Ordinance and article 31 of the Decree of 29 December 1986. The record must be prepared as soon as possible, indicating the nature, date and place of the inspection. It must be signed by the investigator and the party concerned by the investigations. If the latter withholds his signature, this fact must be mentioned in the record. A duplicate of the instrument is given to the parties concerned.

The record is then considered authoritative unless evidence is provided to the contrary.

From the outset, the Paris Court of Appeal paid particular attention to compliance with the formal requirements and in several hearings dismissed such records and the consolidated reports made from them on the ground that they had failed to mention the legal formality of presentation of a duplicate or because they emanated from an anonymous witness.

On the other hand, on several occasions the Court held that the refusal of the director of the firm to sign the record, as required by the law, did not invalidate the instrument.

With regard, more particularly, to the hearings which may be instituted by Council rapporteurs, the Paris Court of Appeal considered that the provision under article 20 of the decree for persons at such hearings to be assisted by counsel was an essential safeguard for the defence. It took the view that the parties concerned must be informed of this right for it to be effectively enjoyed. In cases where this formality was not satisfied, the Court annulled and set aside the records in question.

Beyond ensuring respect for the substantial safeguards relating to the establishment of an official record and the assistance of a lawyer at hearings, the Paris Court of Appeal has, by its way of interpreting and filling the gaps in the legislation, helped to give full meaning to the procedural guarantees concerning investigations.

1. To begin with, the Court was able on a number of occasions to make important clarifications about the nature of the documents that go to prove the existence of anti-competitive practices.

In response to a plea by a firm which had not respected a decision of the Council, a plea to the effect that proceedings based on a report containing correspondence between a lawyer and his client constituted a violation of the rights of the defence, the Court of Appeal quashed the Council's decision. The reasoning was twofold:

After considering that the correspondence in question formed an essential part of the investigation report by the Minister of Economic Affairs and that its subject was the examination between the applicant's counsel and his client of the possible action to be taken in connection with the Council's injunctions (non-fulfilment of which had been the cause for referring the decision to the Court), the Court took the view that the correspondence should "accordingly be at least disallowed in the hearing". However, it went further. It considered that, "since the correspondence could, in view of its detailed and unambiguous content, greatly determine the contents of the report submitted for consideration by the Competition Council, merely producing it in the proceedings irreparably compromised the submission of any argument by the SPFP and, as a result, is prejudicial to the rights of the defence".

This is recognizably the formulation used by the Court of Justice of the Communities in a ruling on a matter of principle concerning the nature and scope of the Commission's powers of investigation under article 14 of Regulation No. 17.

In another case, the Paris Court of Appeal took up the conditions set out by the Court of Justice in the AM&S judgement and recognized the confidential nature of certain documents. To begin with, protected correspondence is correspondence from an independent lawyer, in other words, a lawyer not bound to the client by an employment relationship. Then, the correspondence must have been exchanged for the purposes of the client's defence. This second protection, if it is to be effective, is to be understood as covering not only correspondence exchanged after the start of an investigation that can lead to a decision on the basis of the Ordinance of 1 December 1986 but also earlier directly related correspondence. This was said explicitly by the Court of Appeal in the above-mentioned case.

The Court also explained the meaning of correspondence intended for the client's defence: "... As it was intended to give or obtain a legal opinion before negotiating a contract, it cannot be contended that the correspondence does not form part of the lawyer's advisory activity and is an offence committed by the lawyer or one to which he is an accomplice. As exchanged between the syndicate and its lawyer in the context of a legal consultation, the correspondence is confidential, and although no protest was made when it was seized, the rapporteur was in a position to ascertain its confidential nature when he saw it ...".

The Court pointed out here that the principle of confidentiality covers not only correspondence connected with documents of the defence but also documents relating to a legal opinion. Above all, however, it held that confidentiality could not be argued in cases where the lawyer went beyond his advisory capacity or acted as counsel for the defence.

2. Another point worth noting in an appraisal of the rights of the defence is the principle of non-self-incrimination, a principle whereby the person heard in the course of the investigation should not, through questions put to him, be placed in the position of accusing himself.

The European competition authorities were the first to take a decision on this point. The question arose whether the right not to incriminate oneself, as set out in the International Covenant on Civil and Political Rights, formed part of Community law and should be applicable under Regulation No. 17/62.

In two indispensable judgements of 18 October 1989, the Court of Justice of the Communities, after a scrupulous analysis of the principle in question, gave an enlightening reply regarding its implementation.

First, it pointed out that the Commission's investigatory powers under Regulation No. 17/62 were intended to enable the Commission to fulfil its task, namely, to ensure observance of the rules of competition in the Common Market. The issue was thus placed in its proper context and the Court considered that Regulation No. 17/62 did not expressly set forth a right to keep silent, nor did it recognize an option to evade an investigatory measure;

on the contrary, it imposed an obligation on firms to extend active cooperation. The Luxembourg Court thereby firmly laid down the principle of the requisite effectiveness in the rules of competition "in the general interest and in the interest of individual firms and of consumers".

But, it went on to take the view that it was advisable to consider whether "The general principles of Community law, of which basic rights form an integral part and in the light of which all the texts of Community law should be interpreted, require recognition of a right not to supply information which may be used to determine, against the person supplying the information, that the rules of competition have been infringed". It then considered that neither article 6 of the European Convention on Human Rights nor article 14 of the International Covenant set out a right not to testify against oneself.

However, on the basis of the fundamental principle of the need to ensure respect for the rights of the defence, it considered that "The Commission cannot require a firm to provide replies whereby the firm admitted the existence of an offence which it is incumbent upon the Commission to prove". Accordingly, in the light of these criteria, it partly quashed the decision in question inasmuch as it was based on three issues "which ultimately reversed the onus of proof".

This analysis reveals the concern of the Constitutional Council and the Court of Cassation to "strike a proper balance between effective and consistent powers of investigation on the one hand, and respect for the fundamental rights of firms on the other".

To date, the Paris Court of Appeal has not had occasion to make an appraisal <u>in concreto</u> of the issues raised in the course of an investigation.

However, in a judgement of 21 May 1990, it is clear that it adopted the principles laid down by the Court of Justice.

In fact, the recognized limitations on the Commission's requests for information mean that "... the prior investigation should not irremediably compromise the guarantees of the defence; consequently, if the rapporteur can require the firm's representatives to supply the necessary information on the facts and the documents relating to the submission, he cannot, however, by unfair procedures, elicit from the persons heard any statements that would lead them to confess to the existence of unlawful practices which it is incumbent upon the Competition Council to prove".

<u>Audiatur et altera pars</u>

In the judgement - or decision - phase, the rights of the defence are reflected in the adversary procedure, namely the principle of hearing all of the parties. Conceived in Ancient Greece, perpetuated in Rome and readopted in the Early Middle Ages, the concept of adversary proceedings in which all of the parties are heard, the concept inherent in civil proceedings, was transposed to criminal and to administrative proceedings.

Viewed as the "keystone of the rule of law and of democratic systems", the adversary procedure tends to be applied in all legal (court, arbitration or disciplinary) proceedings, in all branches of law.

The new competition proceedings under the Ordinance of 1 December 1986 also incorporate this constitutional principle common to all the legal systems of the Member States of the European Economic Community.

The Ordinance sets out the cardinal rule in article 18 by affirming that "the preparatory inquiry and the proceedings before the Competition Council are entirely adversary".

It will be seen from the actual terms of the text that, as in criminal proceedings, this basic principle applies not only to the actual hearings but also to all phases preceding preparation of the hearing, which, in essentially written proceedings, are of crucial importance.

In one of its earliest decisions on the merits, the Paris Court of Appeal very clearly stated the scope of the adversary system: "Considering that the five accused companies were aware of the complaints made against them and, after reasonable time-limits were set to reply, they were still able to submit their explanations orally at the Competition Council's sitting, it cannot be maintained that there has been a breach of the principle of adversary proceedings in which all of the parties are heard".

A. At the preparatory stage, the adversary system therefore implies that the firms should be fully informed, and that they be given the requisite time to prepare their defence.

(1) As early as 1988, the Court on two occasions penalized failure to respect the right to be informed. It required that, prior to any decision by the Council, whether the decision was one of inadmissibility or dismissal, the parties should be acquainted with all the documents, including the comments by the Government Commissioner:

> "... But considering that this letter (the comments by the Government Commissioner) was not brought to the notice of the applicants (by the Council on Competition), who were informed of its existence and contents only before the Court ...".

In another case, on the other hand, the Court considered that since the text of the document in dispute had been inserted in the report by the National Investigations Directorate, which was itself annexed to the rapporteur's report, the adversary nature of the proceedings had been respected.

The principle is therefore clear: respect for the principle of adversary proceedings requires the whole of the case file to be communicated to the parties.

However, the Ordinance affords the opportunity of setting aside this basic rule when communication of the documents may be prejudicial to another

essential safeguard, namely, business secrecy. Article 23 specifies this: "The president of the Competition Council may refuse to communicate documents jeopardizing business secrecy, save in cases where communication or consultation of such documents is necessary for the proceedings or for exercise of the rights of the parties. The documents in question shall be withdrawn from the file."

Implementation of these provisions led to a "Business Secrecy Decision" which, of course, rules out any hearing of all the parties by the Presiding Officer, who decides on the basis solely of the comments of the party making the application.

It will be seen that the exception provided for in article 23 of the Ordinance involves an important limitation: if a document seems necessary for the proceedings - in other words, if it provides proof of the practice that is the subject of the complaint - even though it falls under the heading of confidentiality, it has to be placed in the file and communicated.

Again, the decision to divulge the document in dispute - just like a decision to withdraw it - may be appealed in the Paris Court of Appeal only when the Council has decided on the merits, in other words, at a time when the question is no longer of any practical interest (Decree No. 87-849 of 19 October 1987, art. 19).

The solution adopted by the Community authorities is different. Before it enforces a decision whereby it considers that a document is not covered by business secrecy, the Commission is under an obligation to afford the applicant firm "an opportunity to bring the matter before the Court of Justice to check on the appraisals made and to prevent it from being communicated".

While it will be readily seen that comprehensive information - apart from the exception provided for in article 23 - involves disclosing the whole of the file and the related documents, the question has arisen of when such information should be communicated.

Some firms have contended that the rules of the adversary system and of the guarantees of the defence and of article 6 of the European Convention on Human Rights were breached when the rapporteur, before notifying the complaints and without prior communication of the file, proceeded to hear the officials of the companies concerned.

On a number of occasions, the Court of Appeal has replied that "the provisions of article 20 of the Decree of 29 November 1986, which establish the terms and conditions and guarantees for hearings in investigations which rapporteurs of the Competition Council are entitled to make in cases brought before the Council do not demand prior communication of the procedure, since this formality is established under the terms of article 21 of the Ordinance of 1 December 1986, when the submission is followed by notification of the complaints, only in connection with this latter procedural document".

The rule has been laid down:

> "In cases in which they are heard before notification of the complaints, persons whose practices are under consideration are not entitled to see the file but shall simply be summoned to attend and informed by letter of the possibility of being assisted by counsel".

To be fair, it should be added - as has the Court - that, in practice, "when the rapporteur summonses someone in order to hear him, he forwards a copy of the submission so that the person is not ignorant of the purpose of the investigations".

However, from a scrutiny of each of the decisions on the question of hearings by the rapporteur, the conclusion does not seem quite so explicit.

While the Court pointed out that, under the terms of article 21 of the Ordinance, the file is to be communicated only with notification of the complaints, it is none the less careful to note circumstances in which the hearing in dispute does not constitute a manoeuvre intended to undermine the rights of the defence (cf. "Le Bureau Veritas" judgement of 11 October 1991).

If such manoeuvres were ascertained, the Court appears to indicate that the principle of the adversary system would be breached. It doubtless had in mind article 105 of the Code of Procedure, which guarantees impartiality in the conduct of hearings by the examining magistrate.

To take a comprehensive view, it should be pointed out that, in procedures other than notification of complaints, such as inadmissibility (Ordinance of 1 December 1986, art. 19), dismissal (art. 20) and an application for protection measures (art. 12), adversary hearing of all of the parties starts once the case is submitted. It applies to the applicant and to the Government Commissioner, together with "the persons in question" in the case of protection measures.

The Paris Court of Appeal has set out these rules more particularly in connection with a decision of inadmissibility by the Competition Council:

> "Considering that, pursuant to article 18 of the above-mentioned Ordinance the preparatory inquiry and the proceedings before the Competition Council should entail the hearing of all parties;
>
> Considering that, once the referral is made to the Competition Council, the parties should, in accordance with the general principle referred to above, be in a position to submit pleas, explanations and documents for the purposes of a decision, something which implies that all the items gathered by the Council or submitted to it are known to the applicants;
>
> That to meet this obligation, the dispatch by the Director-General of Competition, Consumption and Suppression of Fraud expressing in full detail the view that the application was to be declared inadmissible should have been communicated to the applicant syndicate and group, to enable them to reply to the arguments adduced;

That the omission of this indispensable formality constitutes ignorance of the fully adversary character of the proceedings and should entail annulment of the decision ...".

(2) The second aspect of the adversary system in the preparatory phase is the right of all parties to sufficient time to prepare their defence.

Article 21 of the Ordinance and articles 17 and 21 of the Decree of 29 December 1986 establish the time-limits for notification of complaints or dismissals. The parties and the Government Commissioner have two months to submit their comments. In the case of the procedure under article 21, a further period of two months is allowed after production of the rapporteur's report. In a judgement of 4 July 1990, the Court of Appeal stated that these periods were valid on pain of inadmissibility: "the rapporteur properly applied the text by returning their memoranda, which were not submitted in time". In an application for protection measures, the Council may arrange an emergency procedure which will necessarily be particularly brief.

Article 15 of the Decree of 29 December 1986 leaves it to the president of the Competition Council to establish the time-limits for producing and consulting the comments submitted and the documents that go to make up the file. The president of the Council is allowed the same latitude in the event of a submission that is inadmissible.

Prior review of these various procedures has never led to any objections.

In actual fact, it was when the procedure for verification of the injunctions was first started - a procedure for which there is no provision concerning time-limits - that the Paris Court of Appeal quashed a decision by the Council for failure to observe the adversary system of hearing all of the parties. The Court held that "when it verifies observance of its injunction, the Council is not required to implement the procedure provided for in article 21 of Ordinance of 1 December 1986, but it must nonetheless comply with the major principles resulting from the implementation of article 18, whereby the proceedings are adversary and require all parties to be heard".

Another aspect of the preparatory phase is that a problem has arisen as to whether the Government Commissioner is authorized to produce, in response to the rapporteur's report, a written memorandum without notifying the parties and whether the parties are allowed to reply in writing.

In three judgements in 1990, the Paris Court of Appeal considered that documents submitted by the Government Commissioner, provided they did not contain "any imputation not already heard in the course of the preparatory inquiry", were "intended to strengthen the safeguards of the defence and the hearing of all of the parties" in as much as they "enable the parties to learn, before the Council's sitting, of the comments the Commissioner is entitled to make orally, more particularly regarding the amount of monetary penalties incurred".

The Court explained that this procedural practice "could not allow the parties a further period for reply, in as much as they had two weeks to take notice of the memorandum, whose terms, which cannot be ranked as complaints, are not binding on the Council, and they were able to reply thereto in the oral statements made at the sitting, and were so expressly authorized, by submitting a written note at that time".

B. While the proceedings in the Council are essentially written proceedings, the oral discussions at the sitting should not, for all that, be minimized.

As a confrontation between the parties, the "adversary dialogue", to use P. Nicolopoulos' term - is in terms of form and ritual, a factor of respect for the rights of the defence. It is palpable justice.

Article 25 of the Ordinance covers the oral phase of the proceedings. The sittings are not public; only the parties and the Government Commissioner may attend. The Council is under an obligation to convene the parties by registered letter with acknowledgement to receipt, at least three weeks before the date of the sitting.

The parties may then ask to be heard or to be represented or to attend.

Under his overall powers, the president of the Council arranges the sitting and determines the timing and the order of statements.

As to the duration of statements, the Court of Appeal considered that no plea of nullity for violations of the rights of the defence could be entered because speaking time was restricted, for example to 10 minutes, unless it was shown that the parties "were prevented from developing the arguments already set out in their written memoranda".

As to the order of statements, in practice the firm against which the complaint is made speaks last.

Before the last statement, the Council may hear anyone who seems able to provide information. The rapporteur and the Government Commissioner, if necessary, make their comments.

The Court, like the Prosecutor's Office, scrupulously ensures respect for the principle of the adversary system. It will none the less be seen that this is done by taking into consideration the specific nature of the system of litigation in anticompetitive practices, which, by their economic nature, necessarily call for diligence: public economic order is set in the context of the adversary system of hearing all of the parties.

It will be noted that, in the proceedings before it, the First Division, Competition Section, has since its inception, by means particularly of lectures on procedures, applied the two-fold rule of effectiveness and promptness.

In the course of the Nanterre talks on 11 and 12 March 1988, i.e. less than a year after the transfer of monitoring of the decisions of the Competition Council to the Paris Court of Appeal, President Drai emphasized that "the new law on competition may be regarded as a crucible in which - through the osmosis of disciplines, institutions and men - a major change is taking place. But this change cannot be fruitful unless it is anchored in fundamental values which are inseparable from the law".

This has now happened: procedural guarantees are a reality and a mark of the maturity of competition policy.